11-4-1976

Jimmy Keith Self v. Commonwealth of Kentucky

Reply Brief 1976-SC-0106

REPLY BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 76-106

JIMMY KEITH SELF — APPELLANT

VS. APPEAL FROM McCRACKEN CIRCUIT COURT
HON. C. WARREN EATON, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

REPLY BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Reply Brief For Appellant has been mailed to Hon. C. Warren Eaton, Judge, McCracken Circuit Court, McCracken County Courthouse, Paducah, Kentucky 42001; Hon. Joseph Freeland, Public Defender, 305 Citizens Bank & Trust Co. Bldg., Paducah, Kentucky 42001; Hon. Albert Jones, Commonwealth Attorney, McCracken Circuit Court, McCracken County Courthouse, Paducah, Kentucky 42001; and Hon. Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 1st day of November, 1976.

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MAY IT PLEASE THE COURT:

PURPOSE OF THIS REPLY BRIEF

THE PURPOSE OF THIS BRIEF IS TO RESPOND ONLY TO APPELLEE'S ARGUMENT I. SINCE THE BRIEF FOR APPELLEE FAILS TO REFUTE THE MERITS OF ARGUMENTS II AND III OF THE BRIEF FOR APPELLANT, APPELLANT WILL REST ON THE ARGUMENTATION AND AUTHORITIES FOUND THEREIN.

QUESTION TO WHICH THIS BRIEF ADDRESSED

DOES THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH BY ELECTROCUTION FOR THE CRIME OF MURDER DURING A FIRST DEGREE ROBBERY VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND THE SEVENTEENTH SECTION OF THE CONSTITUTION OF THE COMMONWEALTH OF KENTUCKY?

ARGUMENT

THE IMPOSITION AND CARRYING OUT OF THE MANDATORY SENTENCE OF DEATH BY ELECTROCUTION FOR THE CRIME OF MURDER DURING A FIRST DEGREE ROBBERY VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND THE SEVENTEENTH SECTION OF THE CONSTITUTION OF THE COMMONWEALTH OF KENTUCKY.

At the outset, it must be pointed out that Appellee has failed to respond to two of the three subarguments found

under this assigned error in the Brief For Appellant. While Appellee feebly argues the merits of whether or not the death sentence imposed upon Appellant is violative of the Eight and Fourteenth Amendments, Appellee refused to respond to Appellant's well founded arguments that the imposition and the carrying out of the death penalty violates Kentucky's constitutional prohibition against cruel punishment and that death by electrocution is cruel punishment under federal and this Commonwealth's standards. Perhaps it is understandable why Appellee failed to even attempt to counter these arguments - the imposition and carrying of the death penalty is cruel punishment under our constitution and death by electrocution is so vile and so abhorrent that no one could contend that it is not "inhumane and barbarous treatment or punishment" Weber v. Commonwealth, 303 Ky. 56, 196 S.W.2d 465, 469 (1946).

The reasons for the failure of Appellee to respond to these two well pleaded arguments are, of course, irrelevant. The fact remains that Appellee has failed to file a timely response to these issues. The Court has promulgated a rule to deal with situations such as this, i.e., where the Appellee fails to file a timely response to issues properly raised in the Brief for Appellant:

> If the appellee fails to file his brief . . . within the time allowed, the Court may: (1) Accept the appellant's statement of the facts and issues as correct; or (2) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (3) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case. RAP 1.260(c).

Because of the failure of Appellee to file a brief in opposition to the two above-named issues in the time allowed, this Court should reverse the judgment in Appellant's case, for it is obvious from a perusal of Appellant's arguments in his original pleading that said arguments "appear to sustain such action." RAP 1.260(c)(2). See Hawkins v. Wallace, Ky., 384 S.W.2d 507 (1964); Continental Insurance Company v. Mingo Equipment Co., Ky., 468 S.W.2d 276 (1971).

In the alternative, this Court should consider Appellee's failure to respond to Appellant's arguments "as a confession of error and reverse the judgment without considering the merits of the case." RAP 1.260(c)(3). See Commonwealth ex rel Marcum v. Fitzgerald, Ky., 376 S.W.2d 596 (1964).

Perhaps the appellate counsel for Appellee would have been better off if he did not attempt to respond to any part of ARGUMENT I, for his response is not only highly irresponsible but also borders on the unethical.

Appellee admirably concedes that since Appellant was convicted and sentenced under a mandatory scheme "the sentence imposed upon Appellant must be overturned" (Brief for Appellee hereinafter B.A., p. 5). Once this concession is made, however, counsel for Appellee pulls out all stops in his vengeful trek toward stripping Appellant of his life.

At the outset, Appellee incorrectly states that under our present statutory system "a Kentucky jury can be given the discretion of determining whether a particular aggrevated (sic) murder or kidnapping should be punished as a capital offense or a Class "A" felony." (Id.). Nothing could be farther from the truth. As this Court is well aware under KRS 507.020 an intentional killing is a capital offense when the "defendant's act of killing was intentional, and occurred during the commission of . . . robbery in the first degree" (KRS 507.020(2)(b)). Under KRS 532.030, when a person is convicted of a capital offense the only authorized punishment is death. It is true that there is a provision in our statutory scheme for a capital offense to be tried as a Class A felony, however, this is only the case when, at the time of indictment, the prosecutor elects not to try a defendant for a capital offense (KRS 532.030(1)). Of course, when the prosecutor elects not to try a defendant for a capital offense, legally the jury does not have the power to assess

a capital punishment. On the other hand, if the prosecution, as in this case, fails to elect to try the defendant for a Class A felony instead of a capital offense, and if the jury finds that that defendant is guilty of that offense, again as in this case, then the only authorized punishment is mandatory death (KRS 532.030(1)). Thus, a jury never has the kind of discretion that Appellee contends it has.

Not content with misstating the applicable law as to the jury's discretion, Appellee lumbers on to suggest that this Court should correct the admittedly wanting sentencing procedures by enacting new procedures. Not only does Appellee suggest this constitutionally questionable approach, but also Appellee desires this Court to apply these new procedures retrospectively as to Appellant.

Even if this Court can so encroach upon the Legislature as Appellee suggests and not run afoul of §§27, 28, and 29 of the Constitution of the Commonwealth of Kentucky and even if this Court could apply these new procedures retrospectively as to Appellant and not contravene §19 of our Constitution and Article I, §10 of the United States' Constitution (this would be very doubtful, see Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697 (1964)), it would not entitle Appellee to the relief it seeks herein. As established above, the only legislatively authorized penalty for the jury's determination that Appellant was guilty of an intentional murder during a first degree robbery is death (KRS 532.030(1)). Thus, even if these new procedures were applied to Appellant on remand, the only penalty that Appellant could receive under our statutory scheme would be the same penalty which has been strongly condemned by the Supreme Court of the United States as being beyond the "limits of civilized standards" (Woodson v. North Carolina, 428 U.S. ___, 96 S.Ct. 2978, 2990 (1976)) - mandatory death.

Obviously, Appellee knows or should know that; however, this fact apparently is not enough to dissuade him from attaining his less than admirable goal - "a pound of flesh." Unbelievably, Appellee seems to be asking this Court to not only promulgate and apply retrospectively new sentencing procedures but also to enact and to apply retroactively a new penalty (20 years to life) for the crime for which Appellant was convicted.

If this Court even attempted to designate a new penalty for Appellant's crime, it would most assuredly contravene the long recognized and undisputed constitutional rule "that fixing the penalties for crime is a legislative function" Frye v. Commonwealth, 259 Ky. 337, 82 S.W.2d 431, 433 (1935). If this Court were to sanction the possible application of this new penalty to Appellant's case, it most certainly would not only be an unexpected enlargement of an unambiguous criminal statute, but also it would undoubtedly work to Appellant's disadvantage. Such questionable action by this Court would obviously be unconstitutional since it would violate Appellant's right to due process of law. See Bouie v. City of Columbia, supra wherein the Supreme Court of the United States held that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law" and thus violates the Due Process Clause. Id. 378 U.S. at 353, 84 S.Ct. at 1702.

Counsel for Appellee's frantic attempt to subject Appellant to the death penalty has gone all the way from misstating the law to suggesting to this Court that it delve into matters that are solely legislative in nature.[1]

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[1]It is strange indeed that the appellate counsel for Appellee would take such a vengeful approach when the Hon. Mark Armstrong and the Hon. Patrick Kimberlin, appellate counsel for Appellee in other death penalty cases Commonwealth v. Arrowood, File NO. 76-527 , Boyd v. Commonwealth, File No. 76-392, and Meadows v. Commonwealth, File No. 76-56 , readily

This Court should not countenance such energetic irresponsibility.

Since it is readily apparent that Appellant was tried, convicted and sentenced under an unconstitutional death penalty statute, the question that remains is to what relief is Appellant entitled? In light of the fact that the only penalty legislatively authorized for the crime for which Appellant was convicted is mandatory death, this Court cannot merely remand this case with directions to impose a sentence of life as was done in Caine v. Commonwealth, Ky., 491 S.W.2d 824 (1973), and Lenston v. Commonwealth, Ky., 497 S.W.2d 561 (1973).

It must be remembered that in this jurisdiction the jury determines the issue of guilt and, if necessary, fixes the appropriate penalty in a unitary proceeding. RCr 9.84. This procedure clearly indicates that the jury's assessment of the appropriate penalty should be based not only on the nature of the defendant, but on the circumstances surrounding the crime in question. Logically, if this Court merely remanded Appellant's case for a sentencing hearing, a new jury, summoned solely for the task of determining the appropriate sentence for Appellant, would be required to hear all the evidence presented at Appellant's original trial. Without access to all of that evidence, the sentencing jury would lack the necessary data to provide the comprehensive type of sentencing sought in this jurisdiction and demanded by Gregg v. Georgia, 428 U.S. ____, 96 S.Ct. 2909 (1976). As a result, it is apparent that a rehearing on sentence would be tantamount, at least in terms of evidence presented to a new trial on the merits. Since the fairness of Appellant's trial is questionable (See Arguments II and III in the Brief for Appellant) the ends of justice would be best served by a reversal of Appellant's conviction.

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[1] (continued) conceded the unconstitutionality of the death penalty and just as readily admitted that those three men could not face the death penalty for their crimes.

The death penalty under which Appellant now stands convicted was imposed under a statutory scheme that has been and is proscribed by the "limits of civilized standards." Woodson, v. North Carolina, supra. As such, it cannot be carried out since it undeniably violates the Eighth and Fourteenth Amendments to the United States Constitution. Accordingly, Appellant's mandatory death sentence for his conviction of murder during a first degree robbery cannot constitutionally stand. Therefore, this Court must reverse the judgment against Appellant which imposes the penalty of death for the crime of committing an intentional murder during a first degree robbery, and must remand this case to the McCracken Circuit Court with directions to afford Appellant a new trial untainted by the possibility of a sentence of death.

CONCLUSION

For the foregoing reasons, and for those found in his original pleading, Appellant prays that this Court grant him any and all relief to which he is entitled.

Respectfully submitted,

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